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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' JOINT
ADMINISTRATIVE MOTION FOR
LEAVE TO SUPPLEMENT THE
RECORD IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS
CERTIFICATION; DECLARATION OF
ERIC B. EVANS; SUPPLEMENTAL
DECLARATION OF KEVIN MURPHY;
PROPOSED ORDER**

1 Pursuant to N.D. Cal. Civ. L.R. 7-11 and 7-3(d), Defendants jointly seek leave to
2 supplement the record with limited evidence to address and correct incomplete and misleading
3 information first submitted by Plaintiffs in their reply to Defendants' opposition to Plaintiffs'
4 class certification motion. Defendants do not seek additional briefing, nor do they seek a
5 surreply. Instead, Defendants seek leave to file the following:

6 (1) a short supplemental declaration from Dr. Kevin Murphy setting forth data
7 showing the complete and accurate salary, compensation history and job titles for
8 certain Apple and Intel employees, a portion of which was discussed at
9 paragraphs 63-64 of Dr. Edward Leamer's reply declaration, cited at page 24 of
10 Plaintiffs' reply brief, and partially corrected by Plaintiffs' December 12 letter to
11 the Court;

12 (2) excerpts from Dr. Kevin Murphy's deposition that, in accord with the rule of
13 completeness, correct mischaracterizations of his testimony in Dr. Leamer's reply
14 declaration and in Plaintiffs' reply brief;

15 This limited and highly relevant evidence is necessary to allow Defendants, during oral argument
16 before this Court, to fairly address information Plaintiffs first submitted with their reply brief and
17 supporting papers, and to ensure that the record contains correct and complete information.

18 **Background**

19 On December 10, 2012, Plaintiffs filed their Consolidated Reply in Support of Motion for
20 Class Certification and Opposition to Defendants' Motion to Strike the Report of Dr. Edward E.
21 Leamer ("Reply") and the Reply Expert Report of Edward E. Leamer, Ph.D. ("Leamer Reply
22 Report"). The Leamer Reply Report purports to analyze variations in salary ranges for certain
23 Apple and Intel employees. Leamer Reply Report at ¶¶ 63-64. Plaintiffs reiterated Dr. Leamer's
24 analysis on page 24 of their Reply. Because Dr. Leamer did not include this analysis in his
25 initial expert report, Defendants had no opportunity to respond to this new information in their
26 November 12, 2012 opposition to the class certification motion.

27 In a December 12 letter to the Court, Plaintiffs admit that statements regarding the salary
28 information in Paragraph 63 of the Leamer Reply Report were inaccurate. *See* Dkt. 253. The

1 Leamer Reply Report stated [REDACTED]
2 [REDACTED]
3 [REDACTED] Plaintiffs' December 12
4 letter admitted [REDACTED]
5 [REDACTED]
6 [REDACTED]. Even after this correction, however, the
7 information remains incomplete and misleading because it fails to show [REDACTED]
8 [REDACTED]. The data in Dr. Murphy's
9 supplemental declaration provides a complete and accurate record of these employees'
10 compensation.

11 Plaintiffs also submitted excerpts from Dr. Murphy's deposition. Ex. 13 to the
12 Declaration of Dean Harvey. Dr. Murphy's deposition took place on December 3, 2012, after
13 Defendants filed their opposition to Plaintiffs' class certification motion. Plaintiffs' excerpts are
14 incomplete and misleading because they fail to take into account Dr. Murphy's complete
15 testimony on the topics addressed. In particular, Plaintiffs' Reply cites deposition testimony
16 acknowledging that in certain hypothetical situations, a small information imperfection could
17 have large price effects. Reply at 9. But Plaintiffs' Reply omits Dr. Murphy's other testimony
18 explaining that information imperfections are more likely to affect prices in "different directions"
19 without necessarily resulting in market-wide impacts. Exhibit A to the Declaration of Eric Evans
20 in Support of Defendants' Joint Administrative Motion ("Evans Dec.") at 185-186. Plaintiffs'
21 Reply cites Dr. Murphy's testimony acknowledging a cold call can convey information
22 regardless of whether compensation is discussed. Reply at 9, 11. But it fails to include Dr.
23 Murphy's testimony that specific salary information is unlikely to be part of an initial call, and
24 that "what we're really relying on" is that there are many other ways to recruit people apart from
25 cold calls. Evans Dec., Ex. A at 134-137. Plaintiffs also quote part of Dr. Murphy's testimony
26 noting that internal equity may be *one* factor influencing compensation. Reply at 16. But
27 Plaintiffs completely omit Dr. Murphy's ensuing critique of Dr. Leamer's wage structure
28 analysis based on the data. Evans Dec., Ex. A at 261-264.

Defendants Should Be Permitted to Supplement the Record

With respect to the compensation information regarding Apple and Intel employees at paragraphs 63 and 64 of the Leamer Reply Report, the Ninth Circuit has held in the related context of summary judgment that a district court should not consider new evidence submitted on reply without providing an opportunity to respond. *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (“[W]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-] movant an opportunity to respond.”) (quoting *Black v. TIC Inv. Corp.*, 900 F.2d 112, 116 (7th Cir. 1990)); *see also* Hon. William W. Schwarzer, *et. al.*, 12-C Cal. Prac. Guide (2012) Fed. Civ. Pro. Before Trial ¶12:107.1 (“[I]f the court relies on new material contained in a reply brief, it must afford the opposing party a reasonable opportunity to respond.”) (citing *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164–65 (10th Cir. 1998)). Dr. Murphy’s supplemental declaration provides a brief and reasonable presentation of accurate and complete salary information in response to the new and incomplete information in the Leamer Reply Report.

With respect to Dr. Murphy’s deposition excerpts, Defendants seek leave to submit a small number of additional excerpts that provide necessary context, correction and clarification. “[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion,” the other party may submit the other parts of the document that provide clarification and context. *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988)). Defendants have had no other opportunity to submit the countervailing excerpts from Dr. Murphy’s deposition, and under the rule of completeness should be permitted to do so before the hearing.

In accord with these principles, this Court and others in this District have allowed parties to supplement the record under similar circumstances to address or rebut new and misleading evidence first submitted with a reply. For example, this Court recently granted a party’s administrative motion to augment the record with certain declarations and exhibits submitted after the close of briefing, but shortly before the preliminary injunction hearing, because the

evidence was “rebuttal” evidence. *Apple v. Samsung*, Case No. 11-01846, 2011 WL 7036077 at *4 & n.5 (N.D. Cal. Dec. 2, 2011). The court in another case granted a motion to file supplementary materials consisting of a declaration and six exhibits (memos, letters and a report) offered to rebut or clarify new evidence the other party had submitted on reply. *Baykeeper v. Union Pacific RR Co.*, Case No. 06-02560, 2009 WL 1517868 at *1 n.1 (N.D. Cal. June 1, 2009). And in another case, the court granted, in light of assertions made in a moving party’s reply, the opposing party’s motion to file as supplementary material the transcript of a deposition taken after that party filed its opposition. *Acco Brands, Inc. v. PC Guardian Anti-Theft Products, Inc.*, Case No. 04-03526, 2008 WL 2168379, at *2 n.2 (N.D. Cal. May 22, 2008). Accordingly, Defendants should be permitted to file the limited supplementary evidence submitted with this motion.

Conclusion

The supplemental evidence should be filed and considered in connection with Plaintiffs’ class certification motion.

Dated: January 9, 2013

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ATTESTATION: Pursuant to General Order 45, Part X-B, the filer attests that concurrence in the filing of this document has been obtained from all signatories.